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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., COMPLAINANT, APPELLANT,

vs.

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, RESPONDENTS, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION ON APPEAL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF SOUTH CAROLINA.

To the Honorable, the Justices of the Court aforesaid:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

(a) Statutory Provisions Sustaining Jurisdiction.

This is an appeal from a "Statutory Three Judge Court" for the Eastern District of South Carolina,

wherein appellant sought an interlocutory injunction restraining the South Carolina Tax Commission from collecting a tax upon gasoline purchased by it in South Carolina and used by it exclusively in interstate air transportation, upon the ground that the South Carolina law imposing said tax is unconstitutional because it violates the provisions of Clause 3 of Section 8 of Article I, of the Constitution of the United States. See Bill of Complaint, Record, pages 3 *et seq.**

Section 266 of the Judicial Code as amended (being Act of Congress June 18, 1910, 36 Stat. 557, as amended by 36 Stat. 1162, 37 Stat. 1013, 43 Stat. 938) provides that no interlocutory injunction suspending or restraining the enforcement of any statute of a State shall be granted, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to, and heard and determined by, three judges, which provision of the statute was followed in this case. See Order calling Three Judge Court, page 106; Opinion of Court, page 107; Decree denying Interlocutory Injunction, page 121.

The same section of the Judicial Code provides that "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunc-

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*References to the Record are to the pages of the certified unprinted Record, prepared by the Clerk of the United States District Court for the Eastern District of South Carolina, and on file with the Clerk of this Court. The Record has not yet been printed.

tion in such case." See Notice, page 3; Opinion of Court, pages 107, 116.

(b) Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed was entered on the 4th of September, 1931.

The petition for appeal was presented September 28th, 1931, and allowed September 28th, 1931.

(c) Nature of Case and Ruling Below.

An Act of the General Assembly of the State of South Carolina, approved February 23, 1922 (South Carolina Acts, 1922, pages 835-838), as amended by Act No. 146 of 1923, Act No. 731 of 1924, Act No. 34 of 1925, and Act No. 102 of 1929 (South Carolina Acts, 1929, pages 107-112), provides for the payment of a tax of six cents per gallon upon all gasoline sold within the State. (For further details, see quotations therefrom, paragraph "13" Bill of Complaint, pages 3, 6-9, Record.)

Eastern Air Transport, Inc., a Delaware corporation, is engaged in the business of operating airplanes carrying United States mail and passengers between Newark, New Jersey Airport and points in the State of Florida. In the course of such journeys, its airplanes stop at Spartanburg and Florence in the State of South Carolina. Such airplanes are propelled by internal combustion engines, in which gasoline is used to produce the motive power. Because of the present-day construction of airplanes, it is not possible for

them to take on enough fuel at the Newark Airport to carry them to Florida, and it becomes necessary to refuel or replenish the supply of gasoline at intermediate points, such refueling being done at Spartanburg and Florence in the State of South Carolina.

Eastern Air Transport is engaged, in the State of South Carolina, only in interstate business, that is to say, none of its planes make a flight solely within the State of South Carolina; all of its planes start from a point without the State, and end their journey at points without the State. The stops at Spartanburg and Florence are for the purpose of delivering and/or taking on United States mail and passengers and for refueling, as aforesaid. The passengers and mail taken on at these points are destined for points outside of the State, while the passengers and mail delivered at Spartanburg and Florence come from a point without the State.

In order to refuel its planes at Spartanburg and Florence, both within the State of South Carolina, the company purchases from Standard Oil Company of New Jersey, gasoline at both of those points, which gasoline is intended to be used and is used only in interstate journeys.

In addition to the cost of every gallon of gasoline purchased from Standard Oil Company, the latter exacts from Eastern Air Transport an additional sum of six cents per gallon, which it in turn remits to the State tax authorities of South Carolina, pursuant to the provisions of the South Carolina law.

In the court below the plaintiff sought a preliminary injunction to restrain the enforcement of the aforesaid

State statute and pressed its application to a hearing. The points at issue, which disclose the nature of the case, may be stated as follows:

The exaction from Eastern Air Transport, engaged exclusively in the conduct of interstate airplane transportation, of a tax of six cents per gallon on every gallon of gasoline purchased within the State of South Carolina for use in such interstate commerce, which tax is imposed pursuant to the statutes of said State, results in imposing upon the interstate business of Eastern Air Transport, Inc., such a burden as to make the taxing law of South Carolina unconstitutional, in so far as the laws of South Carolina seek to impose such tax upon gasoline purchased and used exclusively in interstate commerce, because of the interstate commerce provisions of the Constitution of the United States. See Bill of Complaint, pages 3, 12; Opinion of Court, pages 107, 108, 109; Findings of Fact and Conclusions of Law, pages 117, 119.

The court below held that the South Carolina law in question is valid and constitutional and that the collection of the tax imposed by said law, under the circumstances of this case, is not a burden upon interstate commerce; that the State of South Carolina may lawfully impose and collect such tax; and that Eastern Air Transport was not entitled to the interlocutory injunction prayed for. See Conclusions of Law, pages 117, 119, 120. The court thereupon ordered and decreed that the temporary restraining order theretofore granted be dissolved, but that the said temporary restraining order should continue in force for thirty days until the complainant should have an opportunity

to preserve and perfect its rights pending appeal. See Decree Denying Interlocutory Injunction, pages 121, 122.

(d) Cases Believed to Sustain Jurisdiction.

Since McCulloch *v.* Maryland, 4 Wheat. 316, this Court has not, in a proper case, hesitated to declare unconstitutional a statute of a State if it appeared that such statute conflicted with the Constitution of the United States, or any of the powers exercised thereunder, or guarantees thereof. The present action attacks the law of South Carolina upon the ground that it imposes a burden upon interstate commerce, the regulation whereof is reserved to the United States by the Constitution. On numerous occasions this Court has exercised this power with respect to taxing statutes of a State, in cases coming to it from the specially constituted District Court of Three Judges, granting or denying a preliminary injunction against the enforcement of a State statute, or from a State court of last resort, upon the ground that such statute conflicted with the Constitution of the United States. Some of the cases where this Court has recognized its jurisdiction under like circumstances are:

Clark *v.* Poor, 274 U. S. 554.
Helson *v.* Kentucky, 279 U. S. 245.
In Re Buder, 271 U. S. 461, 464.
Looney *v.* Crane and Co., 245 U. S. 178.
Louisville etc. Railroad Co. *v.* Garrett, 231 U. S. 298.
Pan Handle Oil Co. *v.* Mississippi, 277 U. S. 218.

Shaffer *v.* Carter, 252 U. S. 37, 44.
Smith *v.* Wilson, 273 U. S. 388, 391.
Texas Company *v.* Brown, 258 U. S. 466.
Van Dyke *v.* Geary, 244 U. S. 39.

We respectfully submit, that this Court has jurisdiction of this appeal by virtue of Section 266 of the Judicial Code (being Act of Congress, June 18, 1910, 36 Stat. 557, as amended by 36 Stat. 1162, 37 Stat. 1013, 43 Stat. 938), and Section 238 of the Judicial Code (being Act of Congress, March 3, 1891, 26 Stat. 827, as amended by 29 Stat. 492, 31 Stat. 85, 31 Stat. 158, 35 Stat. 838, 36 Stat. 1157, 38 Stat. 804, and 43 Stat. 938), and under the cases cited.

Respectfully submitted,

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